

Supreme Court, U. S.
FILED

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MICHAEL RODAK, JR., CLERK

**In The
SUPREME COURT OF THE UNITED STATES**

October Term, 1976

No. **76-303** Misc.

CONSTANTINOS STAMATINOS,
Petitioner,

vs.

**W. O. MEHRTENS, DISTRICT JUDGE,
and THE INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO, a labor
organization,**

Respondents,

**Motion for Leave to File Petition for Writ of Mandamus
and/or Certiorari
and Petition for Writ of Mandamus and/or Certiorari**

CONSTANTINOS STAMATINOS
Petitioner, in pro per
1065 S.W. 75th Avenue
Miami, Florida 33144

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Respondents,

**Motion for Leave to File Petition for Writ of Mandamus
and/or Certiorari**

The petitioner moves the Court for leave to file the Petition for Writ of Mandamus and/or Certiorari, hereto annexed, under Section 1651 of Title 28 of the United States Code, and further moves that an order and rule be entered and issued directing the Honorable United States District Court for the Southern District of Florida, and particularly the Honorable W. O. Mehrtens, District Judge of said District, to show cause why a writ of mandamus should not be issued against such District Court, in accordance with the prayer of said petition, and to

grant such other and further appropriate relief as may be just and meet.

Further, petitioner seeks a writ of certiorari to review the Order and Final Judgment entered October 24, 1975 (granting summary judgment on a premature motion), and so much of the preceding order of the District Court dated September 15, 1975, which ordered the petitioner to respond to defendant's premature motion for summary judgment (directed to a previous complaint in the cause), for the purpose of clarifying Rule 56(b) of the Federal Rules of Civil Procedure.

Constantinos Stamatinos

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____ Misc.

CONSTANTINOS STAMATINOS,
Petitioner,

vs.

W. O. MEHRTENS, DISTRICT JUDGE,
and THE INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO, a labor
organization,

Respondents,

PETITION

For a Writ of Mandamus and/or Certiorari to the
United States District Court for the Southern District
of Florida, and Particularly to the Honorable W. O.
Mehrtens, District Judge of Said District

Petitioner, Constantinos Stamatinos, prays that a writ of
mandamus issue to the United States District Court for the
Southern District of Florida and particularly to the Honorable

W. O. Mehrtens, District Judge of said District, to show cause on a day to be fixed by this Court why a writ of mandamus should not issue against him directing the aforesaid Judge and the United States District Court to vacate the Order and Final Judgment entered by District Judge W. O. Mehrtens on October 24, 1975 granting a **premature** motion for summary judgment of defendant; and to vacate so much of the preceding Order of September 15, 1975, wherein the District Court directed plaintiff to respond to defendant's premature motion for summary judgment—both contrary to the purpose and intent of the summary judgment Rule 56 of the Federal Rules of Civil Procedure and the guidelines for due process—thereby acting in excess of its jurisdiction.

In the alternative, petitioner prays for a writ of certiorari under 1651(a) to the District Court for the Southern District of Florida to review the two aforementioned Orders, for the purpose of clarifying Rule 56(b) and (c), Federal Rules of Civil Procedure, as it relates to the authority or jurisdiction of the district court and premature motions for summary judgment when a valid claim has been filed under provisions of the Railway Labor Act, 45 U.S.C. 151 et seq.

Opinions Below

Copies of the Orders of September 15, and October 24, 1975 are attached to the Appendix (A. I and II, respectively). Copy of the June 1, 1976 affirmance by the District Court of Appeals for the Fifth Circuit has been made a part of the Appendix as A. III. These are unreported.

Jurisdiction to Review

The dates of the Orders of the District Court sought to be reviewed are September 15, 1975 and October 24, 1975.

Although appeal from the Order and Final Judgment of

October 24, 1975, was taken to the United States of Appeals for the Fifth Circuit, which affirmed, none of the questions being raised in the within petition with respect to the denial of petitioner's constitutional rights of due process and trial by jury by the Orders of the District Court, the jurisdiction of the District Court with regard to Rule 56, or the newly discovered omission of evidence from the courts below, was brought before the appellate court.

The jurisdiction of this Court is invoked under Section 1651(a) of Title 28 U.S.C., and petitioner is respectfully requesting the exercise of this Court's power of supervision under Supreme Court Rule 19 and the law concerning traditional use of the writ of mandamus to confine an inferior court to a lawful exercise of its prescribed jurisdiction. *Schlagenhauf v. Holder*, 85 S.Ct. 234 (1964). In the alternative, review is sought by this Court since it pertains to the construction and application of a Federal Rule of Civil Procedure, Rule 56(b) and (c).

Questions Presented

1. WHETHER THE DISTRICT COURT EXCEEDED ITS JURISDICTION UNDER THE RULES OF PROCEDURE AND DEPRIVED PETITIONER OF DUE PROCESS AND JURY TRIAL BY
 - (a) ORDERING PLAINTIFF TO RESPOND TO A PREMATURE MOTION FOR SUMMARY JUDGMENT DIRECTED TO THE WRONG COMPLAINT;
 - (b) GRANTING SUMMARY JUDGMENT TO DEFENDANT ON PREMATURE MOTION, WHEN SUBSTANTIAL DIFFERENCES EXISTED BETWEEN AMENDED COMPLAINT AND SECOND AMENDED COMPLAINT FILED SUBSEQUENT TO MOTION;

- (c) DISREGARDING CONFLICTING AFFIDAVITS AND EVIDENCE ON PLAINTIFF'S CLAIM UNDER RAILWAY LABOR ACT FOR VIOLATION OF COLLECTIVE BARGAINING AGREEMENT REGARDING HIS REPRESENTATION BEFORE THE SYSTEM BOARD OF ADJUSTMENT THROUGH FRAUD OF UNION GENERAL CHAIRMAN;
 - (d) ORDER CONTAINING FINDINGS OF FACT WHEN SUMMARY JUDGMENT MOTION WAS PREMATURE AND IMPROPERLY BEFORE THE COURT.
2. WHETHER THE OMISSION OF PAGES FROM EXHIBIT FILED IN COURT (COPY NOT FURNISHED PLAINTIFF) RESULTED IN INCOMPLETE AND IMPROPER RECORD BEFORE THE COURTS BELOW.

Statement of Case

The jurisdiction of the District Court was invoked because the case involved a claim for damages arising under the provisions of the Railway Labor Act, 45 U.S.C. 151 et seq.

The claim of petitioner, a former member of respondent Union, was based on the breach of the Union's duty of fair representation for violation of provisions of the collective bargaining agreement by the bad faith and arbitrary actions of the General Chairman of the Union on the day the petitioner's grievance was to be heard before the System Board of Adjustment, which was February 2, 1970.

[Prior to that, the grievance procedure had been instituted by the Union in December, 1968, when the petitioner had been wrongfully discharged by the employer, Northeast Airlines, and then maliciously prosecuted for an alleged theft. After being

prosecuted twice by the employer, two courts had failed to convict him and a complaint for malicious prosecution had been filed in the state court. The grievance had progressed to the System Board of Adjustment level, and what had occurred prior to February 2, 1970, is not actually relevant to petitioner's claim since it is based only on the happenings of February 2, 1970 and subsequently.]

1. It was on February 2, 1970, that the General Chairman, Sutherland, through fraud and misrepresentation, undertook to represent petitioner, contrary to the collective bargaining agreement, paragraph (I) of Article #19, System Board of Adjustment, providing that petitioner could choose his own representative, as follows:

"(I) Employees covered by this Agreement may be represented at Board hearing by such person or persons as they may choose and designate, * * *"

Subsequently, other arbitrary actions of the General Chairman ensued, which culminated in a failure or refusal to process the grievance.

That, briefly, was the background of petitioner's claim. However, when suit was filed on his behalf on January 31, 1975, the case was dismissed, an amended complaint was also filed by plaintiff's attorney and the case was at issue before plaintiff received a copy of the amended complaint and observed that it was defective and conformed neither to the facts nor the evidence. After several conferences with his lawyer, the decision was made to part company, and motion to withdraw was filed by the attorney. Before that, on joint motion, pretrial conference had been reset for August 20, 1975. The day of the pretrial, District Judge W. O. Mehrtens granted the motion to withdraw and announced that the case was going to be set for trial. Counsel for defendant-respondent then obtained permission from the Court to file a motion for summary judgment on Friday, August 29, 1975.

2. Facing a motion for summary judgment with a defec-

tive amended complaint, plaintiff on August 28, 1975, filed a Motion for Leave to File Second Amended Complaint for Damages Under the Railway Labor Act.

3. The next day, on August 29, 1975, notwithstanding plaintiff's motion for leave, defendant filed its **premature** Motion for Summary Judgment and/or Motion to Dismiss on the Pleadings.

4. Part of the material supporting defendant's motion for summary judgment was an exhibit shown as item No. 1 under paragraph 4 on page 2 of the motion and described therein as:

"1. Copy of Transcript of Proceeding before System Board of Adjustment of February 2, 1970 (A copy of this **Transcript** has already been obtained by the plaintiff and accordingly is **not being furnished to plaintiff with this motion.**" (Emphasis added.)

[By way of explanation, counsel for defendant had asked, and plaintiff did agree, that the defendant did not have to furnish a copy of the 281-page Transcript of the SBA proceedings to plaintiff with the summary judgment motion since plaintiff had already obtained a copy of the transcript from the reporter.] Upon a recent examination of the Appendix before the appellate court, however, it was discovered that three pages (numbered 2, 3 and 4 in the original Transcript) had been deliberately omitted from the transcript filed with the court below, resulting in the improper omission of part of the evidence and an incomplete record before the courts below. Because of the size of the Transcript of the System Board of Adjustment proceedings on February 2, 1970, 281 pages in all, only the title or cover page, and the omitted pages (numbered 2, 3 and 4 originally) are included in the Appendix hereto. (A. IV)

[Other intervening pleadings not relevant to the issues of the within petition are not included in this Statement.]

5. On September 8, 1975, plaintiff being without an attorney, filed Motion for Stay of Proceedings in Order to Ob-

tain Counsel, or, in the Alternative for Ruling on Plaintiff's Motion for Leave to File Second Amended Complaint. In this motion for stay, plaintiff also brought to the Court's attention the prematurity of defendant's motion for summary judgment in view of the proposed second amended complaint.

6. On September 15, 1975, District Judge W. O. Mehrtens entered Order Granting Motions for Leave to File Second Amended Complaint; For Leave to Withdraw as Counsel; etc. (A. I), wherein, first of all, he granted plaintiff's motion for leave to file second amended complaint and ordered "that such be filed as the complaint in the cause". Then further on in the same Order of September 15, 1975, Judge Mehrtens proceeded to order plaintiff to respond to the defendant's motion for summary judgment filed August 29, 1975—exceeding his jurisdiction since the motion filed prior to September 15, 1975 (on August 29) at that point was premature as against the second amended complaint just ordered filed—contrary to Rule 56(b) of the Federal Rules of Civil Procedure.

7. This Second Amended Complaint for Damages Under the Railway Labor Act and the exhibits attached, allowed filed September 15, 1975, stated a valid claim under said Act for breach of duty of fair representation by the Union for violation of provisions of the collective bargaining agreement stemming from the bad faith and arbitrary actions of the Union General Chairman Sutherland, which occurred on February 2, 1970 and subsequently. A copy of the second amended complaint (exclusive of its exhibits) is made a part of the Appendix as A. V. The bad faith and arbitrary actions complained of were that Sutherland made fraudulent statements that only he could represent petitioner before the SBA and that it was against the Railway Labor Act for anyone else to do so, and thereafter he fraudulently undertook to be petitioner's representative before the SBA, whereas petitioner desired to and did designate his wife, Mary Stamatinos, to represent him before the SBA. A copy of the written designation was attached as Exhibit "B".

8. Paragraphs (I) and (M) of Article #19 of the collective bargaining agreement were quoted, and the second amended

complaint also set forth how Mary Stamatinos was then relegated to the role of observer and threatened with removal if she participated in the proceedings. Other arbitrary acts of the General Chairman on February 2, 1970 and following, were also detailed, including his failure to respond to telegram of February 9, 1970, informing him of violations of collective bargaining agreement, and letter of May 9, 1971 to him inquiring as to Union's intentions, which amounted to a failure and refusal on the part of the Union to process the grievance. There were substantial differences between the second amended complaint and the prior amended complaint. The amended complaint was vague, ambiguous, incorrect, defective in that it was blaming the System Board of Adjustment for the breach of duty of fair representation, failed to refer to sections of the collective bargaining agreement violated or attach a copy of same, and otherwise failed to state a cause of action against the Union; it contained six pages and two pages of exhibits which were irrelevant to the claim involved. The second amended complaint contained ten pages and the Exhibits A, B, C, D and E contained a total of 40 pages, 50 pages in all.

9. Upon receiving the Order of September 5, 1975, still without benefit of counsel, plaintiff responded to defendant's premature motion with affidavits opposing and memorandum of law. The defendant's motion for summary judgment being on the defective amended complaint, contained many statements not relevant or pertinent to petitioner's claim in the second amended complaint, yet pursuant to the rules all statements which were not controverted would be deemed true, hence plaintiff was additionally burdened by the Order by having to controvert matters not relevant to his claim.

10. The affidavits of petitioner and his wife opposing defendant's motion, their depositions and other evidence furnished by petitioner-plaintiff, amply supported the allegations of the second amended complaint. Additional proof of the General Chairman's conduct and the relegation of Mary Stamatinos to role of observer under threat of removal if she participated in the proceedings, is the Transcript of the SBA pro-

ceedings (attached as Item No. 1 to defendant's motion for summary judgment). The cover page shows the representative for the Company, and then "WILLIAM J. SUTHERLAND, President * * * on behalf of IAM and the grievant." Other pages from the Transcript (original pages Nos. 63, 68, 90, 104, 109, 146, 157, 159 and 160) reveal that when Mrs. Stamatinos attempted to assist, she was prohibited from doing so and threatened. Pertinent portions are:

At page 63, lines 7 and 8:

MRS. STAMATINOS: I - -

MR. SUTHERLAND: Shush.

At page 68, lines 1 and 2:

MRS. STAMATINOS: Say yes or no.

MR. SUTHERLAND: Mary, stop it.

At page 90, lines 16 and 17:

MRS. STAMATINOS: This man is confused.

MR. SUTHERLAND: Wait a minute, Mary.

Page 104, lines 11, 12, 13:

MRS. STAMATINOS: Objection. How would he know?

MR. SUTHERLAND: Mary.

At page 109, lines 10 thru 16:

MRS. STAMATINOS: Mr. Chairman - -

MR. SUTHERLAND: Please (addressing Mrs. Stamatinos). Next time I'm going to have to ask her to leave.

MRS. STAMATINOS: I won't say anything.

MR. SUTHERLAND: She is disrupting the meeting here.

At page 146, lines 9, 10 and 11:

MRS. STAMATINOS: (Indicating)

MR. SUTHERLAND: Mary, would you put that down?

At page 157, lines 12, 13 and 14 [trying to clarify something]:

MRS. STAMATINOS: How about the utility men?

MR. PESCE [the Chairman of the SBA]: That's enough.

At page 159, lines 18, 19 and 20:

MRS. STAMATINOS: (indicating)

MR. SUTHERLAND: Mary, put that down or out you go.

Page 160, lines 1 and 2:

MR. SUTHERLAND: Mary.

Would you ask her to leave.

The foregoing soundly refutes defendant's contention that Mary Stamatinos participated and assisted in representing petitioner before the SBA. However, it does confirm petitioner's allegations in his second amended complaint that she was allowed as an observer and threatened with removal if she participated and, in fact, Sutherland did ask Pesce to have her leave. The above evidence is also contrary to a finding of the District Court in its Order and Final Judgment of "the participation of Plaintiff's representatives at the hearing:". Furthermore, the name of Mary Stamatinos is on omitted page 2 of the Transcript (A. IV) along with other persons present without representative capacity.

11. Below is one example of conflicts in the affidavits of the parties regarding petitioner's representative at the SBA. In his affidavit in support of summary judgment, General Chairman Sutherland stated at page 4 in paragraph 16:

"16. Shortly before the SBA was to meet on or about December 1968, this affiant prepared the IAM's submission on behalf of the grievant and attached various documents thereto so that the grievance would be properly submitted for the four-man SBA to act upon. Therein it is to be noted that the grievance forms submitted to the SBA clearly indicate that this affiant was to act as the representative of the grievant as this affiant had been and was acting in that capacity from the very inception." (Emphasis added.)

Petitioner in his opposing affidavit, on the other hand, states in part in paragraph 19 at page 8:

"However, prior to February 2, 1970, I never was contacted by Sutherland, never spoke to Sutherland or to anyone from the IAM about my representation at the SBA hearing, and I never authorized Sutherland to act as my representative before the SBA hearing—only my wife had been authorized by me to do so, assisted by my IAM representative—meaning Steve Szwec, the Local Chairman of IAM."

The above is only one of many differences in affidavits opposing and supporting summary judgment, which shows the existence of genuine issues of material facts.

12. Notwithstanding defendant's premature motion as it pertained to the second amended complaint, the differences between the amended and second amended complaint, the validity of the claim in the second one, the conflicts, the evidence—all precluding summary judgment—Judge Mehrkens disposed of the matter with his Order and Final Judgment of October 24, 1975, denying petitioner his rights of due process of law and trial by jury, guaranteed by the Fifth and Seventh Amendments of the United States Constitution, and exceeding his authority contrary to Rule 56 of the Federal Rules of Civil Procedure.

Constitution and Rule Involved

U. S. Constitution, Fifth and Seventh Amendments; Federal Rules of Civil Procedure, Rule 56(b) and (c) (A. VI)

Reasons for Granting the Writ

1(a) THE DISTRICT COURT EXCEEDED ITS JURISDICTION UNDER THE RULES OF PROCEDURE AND DEPRIVED PETITIONER (PLAINTIFF) OF

DUE PROCESS AND JURY TRIAL BY ORDERING
HIM TO RESPOND TO A PREMATURE MOTION
FOR SUMMARY JUDGMENT DIRECTED TO THE
WRONG COMPLAINT.

Rule 56(b) states:

"Rule 56. Summary Judgment

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

In the instant case, the chronology in the filing of certain pleadings is the important factor:

On August 28, 1975, plaintiff filed motion for leave to file **second** amended complaint.

On August 29, 1975, defendant filed motion for summary judgment. The complaint in the cause on that date was the Amended Complaint for Damages.

On September 8, 1975, plaintiff filed Motion for Stay of Proceedings in Order to Obtain Counsel, etc., also pointing out prematurity of defendant's summary judgment motion.

On September 15, 1975, the District Court granted leave to amend, ordering that the **second amended** complaint be filed as the complaint in the cause. In this same order of September 15, the District Court ordered plaintiff to respond to defendant's summary judgment motion which had been filed August 29, 1975.

The rule was clarified by the courts in *United States v. William S. Gray & Co.*, 59 F.Supp. 605 (1945), and in *Schwartz v. Compagnie General Transatlantique*, 405 F.2d 270 (1968), thus:

"Defendant may move for summary judgment at any time **after** a pleading stating a claim is served upon him

provided it clearly appears that no valid claim against him exists." (Emphasis added.)

Based on these cases, it is apparent that defendant's summary judgment motion was premature as to the second amended complaint since the defendant had moved **before** the pleading stating a claim was served. It goes without saying that if the summary judgment motion was premature as to the second amended complaint, then certainly no response was required, and the District Court lacked the power or authority to order a response. Further, since defendant's counsel had announced at the pre-trial on August 20, 1975 that said motion had already been prepared, defendant could not have known whether in the Second Amended Complaint of September 15, "it clearly appears that no valid claim against him exists."

In addition, by exceeding its authority as above stated, the District Court deprived plaintiff of orderly due process by placing an unnecessary burden on him to controvert many irrelevant and immaterial statements made in the premature motion directed on the wrong complaint, which if not controverted would be deemed true.

1(b) THE DISTRICT COURT EXCEEDED ITS JURISDICTION UNDER THE RULES OF PROCEDURE AND DEPRIVED PETITIONER OF DUE PROCESS AND JURY TRIAL BY GRANTING SUMMARY JUDGMENT TO DEFENDANT ON PREMATURE MOTION, WHEN SUBSTANTIAL DIFFERENCES EXISTED BETWEEN AMENDED COMPLAINT AND SECOND AMENDED COMPLAINT FILED SUBSEQUENT TO MOTION.

In *Park-in Theatres v. Paramount-Richards Theatres*, 9 F.R.D. 267 (1949), where an amended complaint was filed after defendants had moved for summary judgment (as in the instant case), it was held that where amended complaint was filed showing substantial differences between it and original com-

plaint, defendants' motion for summary judgment on original complaint and affidavits **would be denied** with liberty to renew motion if desired.

Even a cursory glance at the amended and second amended complaints will show that substantial differences exist between the two and that a valid claim was set forth in the second. The amended contained six pages and two irrelevant exhibits—eight pages in all. The second amended consisted of ten pages and six exhibits which included the collective bargaining agreement—a total of fifty pages.

Therefore, in view of the differences in the complaints and the prematureness of defendant's summary judgment motion, the District Court rather than ordering plaintiff to respond to the premature motion contrary to Rule 56(b), should have denied said motion with liberty to renew motion if desired.

1(c) and (d). THE DISTRICT COURT EXCEEDED ITS JURISDICTION UNDER THE RULES OF PROCEDURE AND DEPRIVED PETITIONER OF DUE PROCESS AND JURY TRIAL BY DISREGARDING CONFLICTING AFFIDAVITS AND EVIDENCE ON PLAINTIFF'S CLAIM UNDER RAILWAY LABOR ACT FOR VIOLATION OF COLLECTIVE BARGAINING AGREEMENT REGARDING HIS REPRESENTATION BEFORE THE SYSTEM BOARD OF ADJUSTMENT THROUGH FRAUD OF UNION GENERAL CHAIRMAN

and

ORDER CONTAINING FINDINGS OF FACT WHEN SUMMARY JUDGMENT MOTION WAS PREMATURE AND IMPROPERLY BEFORE THE COURT.

Inasmuch as defendant's motion was premature and improper, it follows that any order granting it and any findings of fact in such order would likewise be improper and invalid. Even if the motion were not premature, however, the existence of a valid claim in the second amended complaint with exhibits

supporting it, and the affidavits opposing the motion created sufficient issues of fact to preclude summary judgment. Thus, with the Order and Final Judgment, the District Court disregarded ordinary guidelines set by this Court in *Poller v. Columbia Broadcasting System*, 82 S.Ct. 486 (1962), that summary judgment is authorized only where moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and where no general issue remains for trial; purpose of the rule is not to cut litigants off from their right of trial to jury if they have issues to try.

The District Court also overlooked that as an employee covered by the collective bargaining agreement under a provision of the Railway Labor Act 153(j), he had certain interests or "property" rights therein, one of which was the right to have the person of his choosing represent him before the System Board of Adjustment at the hearing on his grievance. It was explained by this Court in *Board of Regents v. Roth*, 92 S.Ct. 2701 (1972), and emphasized in *Perry v. Sindermann*, 92 S. Ct. 2694 (1972) thus:

"A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

Petitioner was deprived of said "property" accorded him by Section (I) of Article #19 of the collective bargaining agreement at the SBA hearing through the fraud and misrepresentation of the General-Chairman. The denial of due process was compounded by the subsequent Order of the District Court granting summary judgment to the Union.

2. THE OMISSION OF PAGES FROM EXHIBIT FILED IN COURT (COPY NOT FURNISHED PLAINTIFF) RESULTED IN INCOMPLETE AND IMPROPER RECORD BEFORE THE COURTS BELOW.

The exclusion of pages Nos. 2, 3 and 4 from the Transcript of the SBA Proceedings of February 2, 1970, from the court file, particularly page No. 2, deprived plaintiff of the proper record below. Page 2 is crucial in that it lists the names of the persons present at the SBA hearing without any representative capacity. The name of Mary Stamatinos appears as just such a person on page 2 and confirms plaintiff's allegations to that effect. The omission was a deliberate act on the part of defendant as it involved removing three numbered pages and leaving a gap between the cover page (1) and the next page in the transcript, numbered 5. This deliberate omission may be compared to a fraudulent transcript as in *Chessman v. Teets*, 76 S.Ct. 34 (1955) setting forth a denial of due process, or can be construed as:

"The failure of a party to produce in evidence or to testify in reference to an instrument, when its contents were within his knowledge justifies the presumption that its provisions would have been unfavorable to his position." *Runkle v. Burnham*, 153 U.S. 216, 14 S.Ct. 837.

The omission was discovered two months after the affirmance by the appellate court.

Conclusion

Besides being petitioner's last resort, this Court is the only tribunal that can make a final determination concerning the construction and application of the Federal Rules of Civil Procedure and the rights guaranteed a citizen under the United States Constitution.

WHEREFORE, petitioner respectfully prays that a writ of mandamus and/or certiorari be issued to vacate and/or to review the orders of the District Court for the Southern District of Florida.

Respectfully submitted,



CONSTANTINOS STAMATINOS

Petitioner, in pro per
1065 S.W. 75th Avenue
Miami, Florida 33144

Certificate of Service

I HEREBY CERTIFY that on this 27th day of August, 1976, three copies of the foregoing Motion for Leave to File Petition, etc., and the Petition for Writ of Mandamus and/or Certiorari were mailed to: The Honorable W. O. Mehrtens, District Judge, United States District Court for the Southern District of Florida, Miami, Florida; MANNERS & AMOON, P.A., 123 N.W. 13th Avenue, Miami, Florida 33128, and to PLATO E. PAPPS, ESQ., 1300 Connecticut Avenue, N.W., Washington, D. C., 20036, Attorneys for Respondent IAM; being all parties required to be served.

Constantinos Stamatinas

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 75-134-CIV-WM

CONSTANTINOS STAMATINOS,	Plaintiff,	ORDER GRANTING MOTIONS FOR LEAVE TO FILE SECOND AMENDED COMPLAINT; FOR LEAVE TO WITHDRAW AS COUNSEL; FOR ORDER REQUIRING PRODUCTION; AND DENYING MOTIONS FOR CONTINUANCE; FOR STAY OF PROCEEDINGS; TO STRIKE MATTER IN DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT.
vs.		
THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, a labor organization,	Defendant.	

There being several motions in the cause, as hereinafter enumerated, and the Court having thoroughly considered the same and being further advised in the premises, it is

ORDERED and ADJUDGED that plaintiff's motion to file second amended complaint be and the same is hereby GRANTED; that such be filed as the complaint in the cause; that defendant file its answer within ten (10) days from the date of this Order, but that defendant may reiterate its earlier answer or amend it, if it so desires;

that plaintiff's motion for continuance and stay of proceedings be and the same is hereby DENIED;

that the motion of plaintiff's attorney, Robert S. Korschun, to withdraw as counsel be and the same is hereby GRANTED;

that plaintiff's motion to strike matter in defendant's motion for summary judgment be and the same is hereby DENIED, further;

Appendix I

that plaintiff file his response to the motion for summary judgement within fifteen (15) days from the date of this Order;

that defendant's motion for production be and the same is hereby GRANTED, that plaintiff produce documents relating to and part of his claim against Northeast Airlines and Delta Airlines for inspection and copying by the defendant within ten (10) days from the date of this Order.

DONE and ORDERED at Miami, Florida this 15th day of September, 1975.

/s/ W.O. Mehrtens

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 75-134-CIV-WM

ORDER AND FINAL JUDGMENT

THIS CAUSE, coming on to be heard upon the Defendant's Motion for Summary Judgment, and the Court, after carefully considering the positions of the parties and all of the documents filed herewith, makes the following findings:

1. This cause presents no material issue of fact.
2. The Union, at all times hereto, acted in an honest and good faith manner toward the Plaintiff, as evidenced by the Union's presentation before the four-man System Board of Adjustment; the participation of Plaintiff's representatives at the hearing; the Union's readiness and willingness to have proceeded further with the Plaintiff's grievance but for the Plaintiff's telegram of February 9, 1970, and his failure to produce promised documents to the four-man System Board of Adjustment.
3. The Union, in its representation of the Plaintiff, conducted itself in a good faith, non-arbitrary, non-discriminatory manner, thereby complying with the pronounced fair representation standards of the Supreme Court. *Vaca v. Sipes*, 386 US 171, 17 L.Ed.2d 842, 87 S.Ct. 903 (1967); *Motor Coach Employees v. Lockridge*, 403 US 274, 29 L.Ed.2d 473, 91 S.Ct. 1901 (1971).
4. In light of all the pleadings, exhibits and affidavits heretofore submitted by both parties, the Plaintiff has failed to establish, as a matter of law, that the Union Defendant breached its duty of fair representation.

WHEREFORE, it is

ORDERED and ADJUDGED that the Motion of the Defendant, THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, a Labor Organization, for Summary Judgment is hereby granted, and accordingly, Judgment is entered in favor of the Defendant, THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, a Labor Organization, and against the Plaintiff, CONSTANTINOS STAMATINOS, with taxable costs to be assessed against the Plaintiff.

DONE AND ORDERED at Miami, Florida, this 24 day of October, 1975.

United States District Judge

cc: Constantinos Stamatinos
Plaintiff

Manners and Amoon, P. A.
Plato E. Papps, Esquire
Attorneys for Defendant

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-4228
Summary Calendar*

CONSTANTINOS STAMATINOS,
Plaintiff-Appellant,
versus
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

(June 1, 1976)

BEFORE BROWN, Chief Judge, GEWIN and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.¹

*Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409 Part I.

¹ See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966

NEA-IAM SYSTEM BOARD OF ADJUSTMENT

NORTHEAST AIRLINES, INC.,
and
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS
re: Case No.
368-31-68
Grievance of
CONSTANTINOS STAMATINOS.

Transcript of proceedings had and testimony taken in the above-entitled matter before Louis D. Pesce, Chairman, Leonard R. Meuse, Dan D. Chandler and John J. Kilkelly, members of the above styled Board, on Monday, February 2nd, 1970, at the Northeast Airlines Hangar, Miami International Airport, Miami, Florida, commencing at 10:05 o'clock a.m., pursuant to notice.

APPEARANCES:

FOLEY HOAG & ELIOT, Esquires,
(By Loyd M. Starrett, Esq.),
10 Post Office Square,
Boston, Massachusetts,
on behalf of NEA.

WILLIAM J. SUTHERLAND, President
and General Chairman,
International Association of
Machinists and Aerospace Workers,
Air Transport District 147,
170 Border Street,
East Boston, Massachusetts, on behalf
of IAM and the grievant.

PRESENT:

2

William H. Hutcheson
 Mary Stamatinos
 Paul C. Hammond
 Stephen E. Szwec
 William F. Leigh
 Gordon Betz
 Robert E. Hannigan
 George R. Price
 Constantinos Stamatinos, grievant.

Reported by:

Barbara S. Charney

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Union's Exhibit Number	Nature of Exhibit	Transcript Page
1	Telegram to grievant from Company dated 12-12-68	21
2	Telegram to grievant from Company dated 12-13-68	22
3	Telegram to grievant from Company dated 2-5-69	22
4	Letter to Mr. Sutherland from Mr. Hutcheson dated 12-16-68	23
5	Letter to Mr. Sutherland from Hearing Committee dated 5-14-69	24
6	Letter from Mr. Sutherland to Mr. Ross dated 5-28-69	27
7	Letter dated 6-9-69 to Mr. Sutherland	37
8	Copy of part of Information for grand larceny and transcript of deposition	41
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EXHIBITS

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Company's Exhibit Number	Nature of Exhibit	Transcript Page
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4	Passenger seating arrangement schematic	162
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 75-134-Civ-WM

CONSTANTINOS
STAMATINOS,

Plaintiff,

vs.

SECOND AMENDED
COMPLAINT FOR
DAMAGES UNDER THE
RAILWAY LABOR ACTTHE INTERNATIONAL
ASSOCIATION OF
MACHINISTS AND
AEROSPACE WORKERS,
AFL-CIO, a labor organization,

Defendant.

The plaintiff, CONSTANTINOS STAMATINOS ("Stamatinos"), sues the defendant, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO ("IAM"), a labor organization, for breach of its duty of fair representation and for grounds states:

1. This an action arising under the Railway Labor Act, as amended 45 U.S.C. 151 et seq. Jurisdiction of this action is vested in this Court under 28 U.S.C. 1331 and 1337. The matter in controversy exceeds the sum or value of Ten Thousand Dollars (\$10,000.00) exclusive of interest and costs.

2. The defendant, IAM, is a labor organization under the Railway Labor Act and was the certified collective bargaining representative for the craft of mechanics, helpers, apprentices and utilitymen employed by Northeast Airlines, Inc. until the merger of Northeast into its successor, Delta Airlines, Inc., on or about August 1, 1972.

3. On or about February 2, 1958, Stamatinos was employed by Northeast Airlines as a utilityman and shortly there-

after became a member of the IAM as he was required to do as a condition of his employment.

4. Upon becoming a member of the IAM, Stamatinos faithfully paid his dues and on December 12, 1968, had been a member in good standing for more than ten years. That as a utilityman employee of Northeast Airlines and as a member of the IAM, he was one of a class of the employees covered by the duly executed AGREEMENT between NORTHEAST AIRLINES, INC. and THE EMPLOYEES OF THE COMPANY COMPOSING THE CRAFT OR CLASS OF AIRLINE EMPLOYEES as represented by the INTERNATIONAL ASSOCIATION OF MACHINISTS (Agreement), effective November 10, 1966, and to be in full force and effect through December 31, 1968, under Article #4, paragraph (M), which is set out on page 6. A copy of said Agreement is attached hereto and made a part hereof as **Exhibit "A"**.

5. Under Article #1 - Purpose of Agreement - on page 1, it was "recognized by this Agreement to be the duty of the Company, of the employees, and of the Union representing the employees to cooperate fully, for the attainment of these purposes", among which purposes was the "continuation of employment under conditions of reasonable hours, compensation and working conditions."

6. Article #2 - Scope of Agreement, states under paragraph (C), "This Agreement shall establish for the employees... a procedure for the orderly settlement of any disputes during the term hereof."

7. Article #18 - Grievance Procedure - outlined the procedure for the presentation and adjustment of disputes regarding employees discharged or suspended from the service of the Company.

8. Article #19 - System Board of Adjustment - established a System Board of Adjustment and the procedure to be followed for the purpose of adjusting and deciding disputes not previously settled in accordance with Article #18.

9. On December 12, 1968, Stamatinos was called by his supervisor and threatened with criminal prosecution if he did

not confess and resign. It was understood that this was for the theft of certain meals which had allegedly been stolen from an aircraft on November 27, 1968, as earlier in the day Stamatinos on December 12, 1968, the Director of Security had talked to Stamatinos about it. Upon being threatened, Stamatinos proclaimed his innocence and refused to confess and resign for something he had not done. On December 13, 1968, he was suspended from employment, and thereafter the grievance procedure was started by the local chapter pursuant to Article #18 of the Agreement.

10. Thereafter Stamatinos was in fact prosecuted, the first time in the Justice of the Peace Court, which case was dismissed January 23, 1969.

11. On January 24, 1969, the initial hearing was held by the Company upon Stamatinos' grievance. On February 5, 1969, Stamatinos was advised by telegram from Northeast Airlines that his suspension was permanent and his employment with Northeast Airlines was terminated.

12. Subsequently, in February, 1969, Stamatinos was again arrested on the complaint of the employer, Northeast Airlines, this time in the Criminal Court of Record, in and for Dade County, Florida.

13. On March 12, 1969, a second hearing concerning the discharge of Stamatinos was held by the company and the IAM in Boston, which Stamatinos attended.

14. On April 30, 1969, the Criminal Court of Record case was nolprossed.

15. On May 12, 1969, in view of the fact that five months had passed since the grievance process had been started and it was not proceeding pursuant to Article #18 of the Agreement, and also that the ruination of Stamatinos' good name had not been vindicated by reinstatement although two courts of law had failed to sustain any charges of wrongdoing, an action for malicious prosecution was filed by Stamatinos against the former employer, Northeast Airlines, Inc. and William H. Hutcheson, in the Circuit Court of the 11th Judicial Circuit of

Florida, in and for Dade County, case No. 69-7814.

16. On May 14, 1969, a decision was rendered by the Company hearing committee which concluded that the discharge of Stamatinos was proper.

17. Thereafter advice was received from William J. Sutherland, the General Chairman of the IAM District Lodge 147, by the then attorney for the plaintiff herein that the matter would proceed under Article #19, System Board of Adjustment, of the Agreement.

18. The matter having proceeded to the System Board of Adjustment, it was under the direct control of said General Chairman William J. Sutherland, which control was given to him under paragraph (E) of Article #19, which reads in part as follows:

"(E) The Board shall consider any dispute properly submitted to it by the **General Chairman** of the Union . . . when such dispute has not been previously settled in accordance with the terms provided for in this Agreement." (Emphasis added.)

19. About eight and one-half months later, on January 29, 1970, a telephone call was made by the Local Chairman of the IAM, a Mr. Stephen Szwec, to plaintiff's then attorney, notifying him that the System Board of Adjustment meeting was to be held the following Monday, February 2, 1970, in Miami—**notwithstanding** that notification of such meeting should have been given **in writing** to plaintiff as a party to the dispute, pursuant to paragraph (H), Art. #19, of the Agreement.

20. Disregarding this violation of the Agreement and other previous noncompliance with the terms thereof, plaintiff decided to have his wife, Mary Stamatinos, who was the most informed concerning his case, to be his representative at said SBA meeting, pursuant to paragraph (I) of Article #19 of the Agreement, which reads in part as follows:

"(I) **Employees covered by this Agreement may be represented at Board hearing by such person or persons as they may choose and designate**, and the Company may be represented by such person or persons, as it may choose and designate. **Evidence may be presented either orally, or in writing, or both . . .**" (Emphasis added.)

In conformance with his decision, an original and four copies of an authorization for the representative was signed by Stamatinos in the presence of two witnesses, which was to be submitted to the System Board of Adjustment. A copy of said authorization is attached hereto and made a part hereof as **Exhibit "B"**.

21. Plaintiff's chosen representative, Mary Stamatinos, then prepared a "Supplemental Petition in Support of Reinstatement" setting forth in detail his position for reinstatement with evidence attached. This was done because the System Board meeting was now at hand and no one from the Union had ever contacted plaintiff personally about his case and the requirements of paragraph (G), Art. #19, of the Agreement, that is:

- "1. Question or questions at issue.
2. Statement of facts.
3. Position of employee or employees.
4. Position of Company."

or evidence to be presented, pursuant to Article #19, paragraph (I). Copy of the Supplemental Petition with attachments is made a part hereof as **Exhibit "C"**.

22. On February 2, the following events occurred:

A. On the morning of February 2, 1970, prior to the meeting, Stamatinos and his wife met and Stamatinos informed General Chairman Sutherland of his decision to have his wife be his representative pursuant to paragraph (I), Article #19 and presented the executed authorization, at which time Sutherland did wilfully, deliberately, arbi-

trarily and in bad faith refuse to allow plaintiff to have his chosen representative by making the false and erroneous statement that it was against the Railway Labor Act for plaintiff to have his wife represent him, and the further false and erroneous statement that he, Sutherland, had to represent him at the meeting. That said action and conduct was arbitrary, capricious, discriminatory and in bad faith as Sutherland well knew that his statements were untrue, dishonest and gross misrepresentations of the Agreement.

B. Sutherland backed up his false statements regarding the Railway Labor Act by referring to the first sentence in the Preamble of the Agreement, which states, "THIS AGREEMENT is made and entered into in accordance with the provisions of the Railway Labor Act . . ." Since Stamatinos was not familiar with the Railway Labor Act and at that point had implicit trust in the General Chairman having no reason to doubt his truthfulness, Stamatinos accepted Sutherland's gross misrepresentations as truth.

C. The Supplemental Petition with attachments (Exhibit "C") was then proffered to Sutherland for submission but after reading it hastily, Sutherland returned it and disregarded it.

23. Plaintiff not being familiar with the Railway Labor Act or the entire Agreement, accepted Sutherland's false statements and attended the System Board of Adjustment meeting.

24. After the meeting, upon arriving home and checking the Agreement further, plaintiff found that Sutherland had deliberately and wilfully lied to him about the Railway Labor Act, because his statement was in direct contradiction to paragraph (I) and to paragraph (M) of Article #19, which reads as follows:

"(M) Nothing herein shall be construed to limit, restrict, or abridge the rights or privileges accorded either to the employees or to the Company, or to their duly ac-

credited representatives, under the provisions of the Railway Labor Act, as amended."

25. On further reviewing the conduct and actions of Sutherland at the SBA hearing, it was obvious to plaintiff that the IAM through the dishonest and bad faith conduct of its officer and agent WILLIAM J. SUTHERLAND, acting in his capacity as General Chairman, had breached its duty of fair representation as follows:

A. Sutherland had usurped Stamatinos' right to choose his own representative, depriving plaintiff of the privilege of presenting his position for reinstatement to the SBA, which he was entitled to per paragraph (G) and had further deprived him of having a proper prior record of his position for presentation to a referee appointed by the National Mediation Board, which would have been the next step in the event of a deadlock by the SBA in reaching a decision, pursuant to paragraph (L), Article #19 of the Agreement.

B. He ignored the correct issues as shown in the Supplemental Petition and also the established and accepted criteria for reinstatement, namely, that when a person is found innocent of charges in courts of law, he is automatically and immediately reinstated. The ignoring of this criteria by Sutherland throughout the entire hearing is evidenced in his summation at the conclusion of the hearing as follows:

"In my closing statement, I would like to first request of the Board that certain documents become part of the record here today because of the injection of the outside court cases that were injected, even though it was over my protest . . ."

C. He allowed totally irrelevant matters to be brought up.

D. He set forth the wrong issue — violation of Art. #18(C).

E. Out of a total of 280 pages comprising the transcript of the proceedings of the System Board of Adjustment on February 2, 1970, Sutherland's sum and total presentation of witnesses and witnesses' testimony on behalf of the plaintiff consisted of 15 lines as follows: Sutherland's questioning of plaintiff after identification:

"Q You were an employee of Northeast Airlines?

A I was.

Q Are you familiar with the incidents surrounding the discharge, of your discharge from Northeast?

A Yes.

Q Let me ask you, Gus, did you take any steaks off the airplane?

A No, I did not take any steaks and I never saw anybody taking the steaks.

Q Gus, just answer the question.

Did you take any steaks off the airplane?

A No.

MR. SUTHERLAND: Mr. Chairman, your witness."

26. That in addition to violations of provisions of the Agreement, said System Board of Adjustment hearing was also illegal in that an officer of the law, a Sgt. Paul Hammond of the Dade County Public Safety Department, who had issued the warrant for plaintiff's first arrest, was present during practically the entire proceedings, and the plaintiff was not represented by an attorney and had even been deprived of the representative of his choosing.

27. That the refusal of the General Chairman to allow plaintiff to have his chosen representative, and the fact that he was being represented by someone almost totally unfamiliar

with the events connected with his discharge and prosecution, who was presenting the wrong issues and allowing irrelevant matters into the proceedings, so upset plaintiff emotionally and physically that he was unable to recall important events and function as a proper witness in his own behalf on cross-examination.

28. That after wrestling with the problem a week, on February 9, 1970, before any decision had yet been rendered by the SBA, plaintiff instructed his wife to send a telegram to each member of the SBA and to William J. Sutherland, reading as follows:

DUE TO VIOLATION OF PROVISIONS OF THE AGREEMENT AND THE NATURE OF THE PROCEEDINGS WHICH WERE ALSO IN VIOLATION OF MY CONSTITUTIONAL RIGHTS, THIS IS TO NOTIFY YOU THAT I DO NOT RECOGNIZE THE PROCEEDINGS OF THE SYSTEM BOARD OF ADJUSTMENT HELD FEBRUARY 2, IN MIAMI, AS LEGAL OR VALID, NOR WILL I ACCEPT ANY DECISION THAT MAY BE RENDERED AS A RESULT THEREOF.

(signed) CONSTANTINOS STAMATINOS

No reply or communication or inquiry was ever received from Sutherland or anyone from the IAM regarding this telegram, Sutherland very well knowing which provisions of the Agreement had been violated.

29. On May 9, 1971, a letter was dispatched by Mrs. Stamatinos inquiring what Sutherland intended to do about plaintiff's reinstatement. A copy of said letter is attached hereto as Exhibit "D". No response was ever received from Sutherland to that letter.

30. On August 1, 1972, Northeast Airlines was merged into Delta Airlines. A copy of a notice concerning said merger is attached as Exhibit "E". At that point, August 1, 1972, the defendant IAM lost its representation rights and collective bargaining status with the successor, Delta Airlines, thereby render-

ing impossible the continuance of the grievance process and the return of the plaintiff's job rights and seniority.

31. The wilful, deliberate and arbitrary refusal of Sutherland to reply either to the telegram of February 9, 1970, or the letter of May 9, 1971, and the additional failure of the IAM or anyone else connected therewith to either obtain a rehearing before the SBA to correct the deliberate violations of Stamatinos' rights under the Agreement, or to have Stamatinos reinstated, was in bad faith and a wilful breach of the duty of fair representation, and amounted to a failure and refusal to process the grievance of Stamatinos.

32. That the IAM by the bad faith conduct of its General Chairman aforesaid in making deliberate misrepresentations concerning provisions of the Agreement and his deliberate, wilful, capricious and arbitrary refusal to present the proper issue in accordance with the Supplemental Petition of the plaintiff, necessitated the sending of the telegram and was responsible for the interruption of the grievance process, and is therefore liable for the interruption and the damages which resulted in the refusal to process the grievance further.

33. As a result of the foregoing breach of the duty of fair representation, the plaintiff has suffered damages which include the loss of wages, job rights and seniority with Northeast Airlines, Inc. and its successor, Delta Airlines, Inc., has suffered mental anguish, humiliation, pain, suffering and emotional stress and disturbance and has been required to retain an attorney to seek redress of this breach of the duty of fair representation.

WHEREFORE, plaintiff, CONSTANTINOS STAMATINOS, sues the defendant, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, a labor organization, for damages in an amount in excess of Ten Thousand Dollars (\$10,000.00) exclusive of interest and costs, and prays for an award of the plaintiff's attorney's fees and the costs of this action.

Plaintiff demands trial by jury.

(signed) CONSTANTINOS STAMATINOS
in pro per
1065 S.W. 75th Avenue
Miami, Florida 33144 (305-261-4483)

I HEREBY CERTIFY that a true and correct copy of the foregoing Second Amended Complaint was delivered to Manners and Amoon, P.A., 123 N. W. 12th Avenue, Miami, Florida, and mailed to Plato E. Papps, Esq., International Association of Machinists and Aerospace Workers, 1300 Connecticut Avenue, N.W., Washington, D.C., attorneys for defendant, the 28th day of August, 1975.

(signed) CONSTANTINOS STAMATINOS
in pro per
1065 S.W. 75th Avenue
Miami, Florida 33144 (305-261-4483)

The United States Constitution

Amendment 5:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation."

Amendment 7:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law."

Federal Rules of Civil Procedure

Rule 56. Summary Judgment

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) Motion and Proceedings Thereon. * * * The judgment sought shall be rendered forthwith if the plead-

ings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * * "

Supreme Court, U. S.
FILED

~~SEP 27~~ 1976

MICHAEL RODAK, JR., CLERK

in the
Supreme Court
of the
United States

OCTOBER TERM, 1976

No. 76-303 MISC.

CONSTANTINOS STAMATINOS,

Petitioner,

vs.

W. O. MEHRTENS, DISTRICT JUDGE and THE
INTERNATIONAL ASSOCIATION OF MACHIN-
ISTS AND AEROSPACE WORKERS, AFL-CIO, a
labor organization,

Respondents.

**BRIEF OF RESPONDENT—INTERNATIONAL
ASSOCIATION OF MACHINISTS AND AEROSPACE
WORKERS IN OPPOSITION TO PETITION FOR
WRIT OF MANDAMUS and/or CERTIORARI**

Respectfully submitted,

PLATO E. PAPPS
General Counsel, IAMAW
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036

and

JOSEPH P. MANNERS
GEORGE H. TUCKER
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123 Northwest 12th Avenue
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Attorneys for Respondent-IAMAW

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in the
Supreme Court
of the
United States

OCTOBER TERM, 1976

NO. 76-303 MISC.

CONSTANTINOS STAMATINOS,
Petitioner,

vs.

W. O. MEHRTENS, DISTRICT JUDGE and THE
INTERNATIONAL ASSOCIATION OF MACHIN-
ISTS AND AEROSPACE WORKERS, AFL-CIO, a
labor organization,

Respondents.

**BRIEF OF RESPONDENT—INTERNATIONAL
ASSOCIATION OF MACHINISTS AND AEROSPACE
WORKERS IN OPPOSITION TO PETITION FOR
WRIT OF MANDAMUS and/or CERTIORARI**

JURISDICTION TO REVIEW

The Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1651(a), and Supreme Court Rule 19. The Respondent takes issue with the applicability of Supreme Court Rule 19 and believes that Supreme Court Rules 30 and 31 are the rules applicable to a Petition for a Writ authorized by 28 U.S.C. §1651(a).

QUESTION PRESENTED

1. WHETHER THIS PETITION SHOULD BE ENTERTAINED BY THE COURT IN THAT:

(a) THE INSTANT CASE DOES NOT PRESENT A SITUATION SUFFICIENTLY EXCEPTIONAL TO WARRANT THE ISSUANCE OF EITHER A WRIT OF MANDAMUS OR A WRIT OF CERTIORARI PURSUANT TO 28 U.S.C. §1651(a).

(b) THE FACTS AND CIRCUMSTANCES OF THIS CASE REQUIRE APPLICATION TO THE FIFTH CIRCUIT COURT OF APPEALS FOR ITS CONSIDERATION AS TO WHETHER A WRIT OF MANDAMUS SHOULD ISSUE.

(c) THE INSTANT CASE DOES NOT PRESENT ISSUES EITHER SUFFICIENTLY UNIQUE OR IMPORTANT TO NECESSITATE CERTIORARI REVIEW PURSUANT TO 28 U.S.C. §1254 AND SUPREME COURT RULE 19.

STATEMENT OF CASE

The jurisdiction of the District Court was invoked pursuant to a claim arising under the Railway Labor Act, 45 U.S.C. 151 *et seq.*

The Petitioner filed suit against the Respondent Union alleging that the Union breached its duty of fair representation by failing to allow the Petitioner's wife, Mrs. Stamatinos, to exclusively represent and control the presentation of Petitioner's grievance before the February 2nd, 1970 Four Man System Board of Adjustment. The Petitioner alleges no wrongdoing by the Union prior to February 2nd, 1970.

On February 2nd, 1970, prior to the hearing, the Stamatinos met with the Union representatives and requested that Mrs. Stamatinos represent her husband before the System Board of Adjustment to be assisted by another Union representative. The Union representative, Sutherland, who had authorized this arbitration by his submission to the Four Member System Board of Adjustment, explained that he was in charge and that the Petitioner's personal representatives, including his wife and attorney, could assist. He further explained that this was the way he had always handled discharge cases as it was the Union's duty to administer the provisions of the Collective Bargaining Agreement. This was the way he was going to handle this case which he had prepared to move forward and somewhere along the line was hopeful of winning.

The hearing took place, and Mrs. Stamatinos did assist in the proceeding to the point where her conduct could be characterized as vociferous and at times, hyperactive. No objections or statements as to the Union representation of the Petitioner were made to the System Board of Adjustment by either the Petitioner or his wife, nor did either state that they wanted Mrs. Stamatinos to represent the Petitioner. Petitioner's attorney, who was also present during the latter part of the hearing, was heard by the System Board of Adjustment. The hearing was concluded with the request from the Union representative through Petitioner's attorney urging that the System Board of Adjustment permit certain documents which Petitioner's attorney was going to obtain and serve upon opposing counsel to be introduced at a later date. However, the documents were not forthcoming! Without consulting with his attorney or the Union, the Petitioner unilaterally prepared and transmitted the telegram dated February 9th, 1970, which stated:

"Due to violation of provisions of the agreement and the nature of the proceedings which were also in violation of my constitutional rights, this is to notify you that I do not recognize the proceedings of the system board of adjustment held February 2, in Miami as legal or valid, nor will I accept any decision that may be rendered as a result thereof."

The Petitioner also directed his attorney not to send the documents and thus, the documents were never sent, (nor was anyone told that the documents were never to be sent). The Union, through its representative, was completely surprised by the February 9th, 1970 telegram. The System

Board of Adjustment proceedings ground to a halt and were never concluded. And, despite subsequent efforts by the Union to move the System Board of Adjustment to a decision, no decision was rendered.

The District Court acted upon the Union's Motion for Summary Judgment which encompassed all the allegations contained in both the Amended Complaint and the Second Amended Complaint filed on September 15, 1975. The court, after considering all the pleadings, exhibits, (including the three alleged omitted pages of the February 2nd, 1970 hearing), and affidavits, submitted by both parties, rendered its October 24th, 1975 Order and Final Judgment and found that there was no material issue of fact and that the Union, at all times, acted in an honest and good faith, non-discriminatory manner toward the Petitioner as evidenced by the Union's presentation before the Four Man System Board of Adjustment, the participation of Petitioner's representatives at the hearing, and the Union's readiness and willingness to have proceeded further with the Petitioner's grievance but for Petitioner's telegram of February 9th, 1970, and his failure to produce promised documents to the System Board of Adjustment.

On Petitioner's Appeal, the Court of Appeals affirmed per curium the Order and Final Judgment rendered by the District Court.

ARGUMENT

1. THIS PETITION SHOULD NOT BE ENTER- TAINED BY THE COURT IN THAT:

(a) THE INSTANT CASE DOES NOT PRESENT A SITUATION SUFFICIENTLY EXCEPTIONAL TO WARRANT THE ISSUANCE OF EITHER A WRIT OF MANDAMUS OR A WRIT OF CERTIORARI PURSUANT TO 28 U.S.C. §1651(a).

The issuance by the court of any writ authorized by 28 U.S.C. §1651(a) is not a matter of right but of sound discretion. This discretion concerning the issuance of extraordinary writs should be sparingly exercised as they are drastic and extraordinary remedies reserved for extraordinary cases. Supreme Court Rule 30; *Ex parte Fahey*, 332 U.S. 258, 91 L.Ed. 2041, 67 S.Ct. 1558 (1947); *Will v. United States*, 389 U.S. 90, 19 L.Ed.2d 305, 88 S.Ct. 269 (1967); *Ex parte Peru*, 318 U.S. 578, 87 L.Ed. 1014, 63 S.Ct. 793 (1943); *Parr v. United States*, 351 U.S. 513, 100 L.Ed. 1377, 76 S.Ct. 912 (1956). Moreover, the extraordinary writs may not be utilized as substitutes for the ordinary appellate procedures whenever it is claimed that the lower court has acted beyond its jurisdiction. The writs are to be used only when, for some special reason, remedy by appeal does not provide an adequate remedy. *Bankers Life Co. v. Holland*, 346 U.S. 379, 98 L.Ed. 106, 74 S.Ct. 145 (1953).

The writs of mandamus, certiorari, and prohibition, although to some extent serving different functions, do overlap and the same general principles are utilized in de-

termining their applicability [See *Ex parte Collett*, 337 U.S. 55, 93 L.Ed. 1207, 69 S.Ct. 944 (1949); *Kilpatrick v. Texas Pacific Railway*, 337 U.S. 75, 93 L.Ed. 1223, 69 S.Ct. 953 (1949); *United States v. National City Lines*, 337 U.S. 78, 93 L.Ed. 1226, 69 S.Ct. 959 (1949) in which the court decided each case on the merits without noticing the differences among the writs.] Generally, extraordinary writs are utilized either to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so; [*Roche v. Evaporated Milk Association*, 319 U.S. 21, 87 L.Ed. 1185, 63 S.Ct. 938 (1943); *Will v. United States*, supra]; or to compel a lower court to comply with the mandate of an appellate court; [*In Re Sanford Fork and Tool Co.*, 160 U.S. 247, 40 L.Ed. 414, 16 S.Ct. 291 (1895)]; or to preserve the appellate jurisdiction of the Supreme Court which would be defeated by unlawful action of a lower court case; [*Ex parte United States*, 287 U.S. 241, 77 L.Ed. 283, 53 S.Ct. 129 (1932)]. The latter two instances are inapplicable to the instant case. And, only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of these writs. *DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 89 L.Ed. 1566, 65 S.Ct. 1130 (1945).

The instant case falls far short of presenting a situation sufficiently exceptional to warrant the issuance of either the writ of mandamus or certiorari.

The District Court, pursuant to its prescribed jurisdiction and authority under Rule 56, Federal Rules of Civil Procedure, determined, after considering all the pleadings, exhibits, and affidavits, that there existed no issue of material fact and that the Union was entitled to

judgment as a matter of law. The Union's Motion for Summary Judgment and/or Motion to Dismiss on the Pleadings, although filed prior to Petitioner's Second Amended Complaint, encompassed all the allegations contained in that Second Amended Complaint. And, the Court, it is important to note, did not rule upon the Union's Motion until AFTER the Second Amended Complaint had been filed. Thus, it was of no consequence when the Motion for Summary Judgment was filed in light of the fact that the Court, pursuant to its prescribed jurisdiction, ruled upon the Motion after considering the allegations contained in the Second Amended Complaint.

Moreover, any questions as to the existence of material facts rested within the discretionary powers of the District Court. Clearly, the Petitioner's Reasons for Granting the Writ all relate to the propriety of the District Court's Order granting Summary Judgment and these issues either were raised or should have been raised in the Court of Appeals. The Petitioner, through this Petition for Writ of Mandamus and/or Certiorari, is again seeking review of the same issues which were considered and affirmed through the ordinary appellate process.

The Petitioner's assertion that three pages were deliberately omitted from an exhibit filed with the Union's Motion for Summary Judgment and/or Motion to Dismiss on the Pleadings is untrue and has no basis in fact. The alleged three omitted pages from the Transcript of the February 2nd, 1970 hearing before the System Board of Adjustment were, in fact, filed with the Union's Motion and were part of the original record which was considered by the District Court. The Clerk of the District Court for

the Southern District of Florida has certified that these alleged omitted pages are contained in the file. (See Appendix I.)

Moreover, any failure to include the alleged omitted pages in the Appendix before the Court of Appeals lies with the Petitioner's attorney as he has the duty to verify that the Record on Appeal, compiled by the Clerk, contains all the designated portions.

The Petitioner has failed to set forth in a clear and indisputable fashion that the instant case warrants the invocation of this Court's discretionary power to issue the requested extraordinary writs. The District Court, at all times, acted lawfully and within its prescribed jurisdiction and thus, the requested writs should not issue. And, aside from the prior review from the Court of Appeals, the most that can be claimed:

" . . . is that the district courts have erred in ruling on matters within their jurisdiction. *The extraordinary writs do not reach to such cases*; they may not be used to thwart the congressional policy against piecemeal appeals. *Parr v. United States*, supra, at 520, 521, citing *Roche v. Evaporated Milk Association*, (Emphasis Added).

Accordingly, this Court should deny the instant Petition.

(b) THE FACTS AND CIRCUMSTANCES OF THIS CASE REQUIRE APPLICATION TO THE FIFTH CIRCUIT COURT OF APPEALS FOR ITS CONSIDERATION AS TO WHETHER A WRIT OF MANDAMUS SHOULD ISSUE.

Where an alleged unlawful act has been committed by a court immediately below the Supreme Court, to-wit: a United States Court of Appeals, or a United States District Court in a case directly appealable to the Supreme Court, the application for a writ must be made to the Supreme Court. *Williams v. Simons*, 355 U.S. 49, 2 L.Ed.2d 87, 78 S.Ct. 109 (1957). However, where there is an intermediate appellate court, as in the ordinary case in a United States District Court, the application "ordinarily must be made to the intermediate appellate court". *Ex parte Peru*, supra, at 585. Only when exceptional circumstances exist — does the Supreme Court issue extraordinary writs without prior application to the Court of Appeals. As discussed in subsection (a), supra, no such exceptional situation is presented by the facts of this case and thus, the instant Petition should not be entertained by this Court.

(c) THE INSTANT CASE DOES NOT PRESENT ISSUES EITHER SUFFICIENTLY UNIQUE OR IMPORTANT TO NECESSITATE CERTIORARI REVIEW PURSUANT TO 28 U.S.C. §1254 AND SUPREME COURT RULE 19.

The decision of the District Court and its subsequent affirmance by the Court of Appeals involved a determination that there was no issue of material fact and that the

Union conducted itself in a good faith, non-discriminatory manner toward the Petitioner. The decision rested upon its narrowly circumscribed facts and thus, does not involve any intrinsically important legal questions or any conflicts with cases which would deem review by this Court appropriate.

Moreover, the decision of the District Court, involving substantially the same issues, was affirmed by the Court of Appeals and thus, the propriety of that decision is firmly established.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Mandamus and/or Certiorari should be denied.

Respectfully submitted,

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and

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By: /s/ Joseph P. Manners

JOSEPH P. MANNERS

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that three copies of the foregoing Brief of Respondent-International Association of Machinists and Aerospace Workers in Opposition to Petition for Writ of Mandamus and/or Certiorari, was mailed to: Constantinos Stamatinos, 1065 S.W. 75 Avenue, Miami, Florida, 33144, on this 17 day of September, 1976.

MANNERS AND AMOON, P.A.

By: /s/ Joseph P. Manners

JOSEPH P. MANNERS

APPENDIX

APPENDIX I

**CERTIFICATION OF THE DISTRICT CLERK
OF THE U. S. DISTRICT COURT FOR
THE SOUTHERN DISTRICT
OF FLORIDA**

I, JOSEPH I. BOGART, District Clerk of the U. S. District Court for the Southern District of Florida, do hereby certify that Pages 2, 3 and 4 from the Transcript of the SBA Proceedings of February 2, 1970, are contained in the District Court file of the case styled STAMATINOS v. THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, a labor organization, Case No. 75-134 CIV-WM. This file in toto was transmitted to the Fifth Circuit Court of Appeals during the pendency of the appeal and returned to this Court after the Mandate was issued.

JOSEPH I. BOGART, Clerk

BY: /s/ Ruth M. Wood

RUTH M. WOOD, Deputy Clerk

Dated: September 10, 1976